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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**STATE OF CALIFORNIA by and through
Attorney General Xavier Becerra;
COUNTY OF LOS ANGELES; CITY OF
LOS ANGELES; CITY OF FREMONT;
CITY OF LONG BEACH; CITY OF
OAKLAND; CITY OF STOCKTON,**

Plaintiffs,

v.

**WILBUR L. ROSS, JR., in his official
capacity as Secretary of the U.S.
Department of Commerce; U.S.
DEPARTMENT OF COMMERCE; RON
JARMIN, in his official capacity as Acting
Director of the U.S. Census Bureau; U.S.
CENSUS BUREAU; DOES 1-100,**

Defendants.

3:18-cv-01865

**STIPULATION AND ~~PROPOSED~~
ORDER FOR LEAVE TO CONDUCT
TRIAL DEPOSITION OF EXPERT
WITNESS PAMELA KARLAN;
DECLARATION OF ANNA T.
FERRARI; DECLARATION OF
PAMELA S. KARLAN**

Dept: 3
Judge: The Honorable Richard G.
Seeborg
Trial Date: January 7, 2019
Action Filed: March 26, 2018

Case No. 5:18-cv-02279

**CITY OF SAN JOSE, a municipal
corporation; and BLACK ALLIANCE FOR
JUST IMMIGRATION, a California Non-
Profit Corporation,**

Plaintiffs,

v.

**WILBUR L. ROSS, JR., in his official
capacity as Secretary of the U.S.
Department of Commerce; U.S.
DEPARTMENT OF COMMERCE; RON
JARMIN, in his official capacity as Acting
Director of the U.S. Census Bureau; U.S.
CENSUS BUREAU,**

Defendants.

**STIPULATION FOR LEAVE TO CONDUCT TRIAL DEPOSITION OF EXPERT
WITNESS PAMELA KARLAN**

Plaintiffs, Plaintiff-in-Intervention, and Defendants in the cases of *California et al. v. Ross et al.*, 18-cv-1865 and *San Jose et al. v. Ross et al.*, 18-cv-2279, hereby stipulate as follows:

1. The parties seek an order pursuant to Civil Local Rule 6-2 to conduct a *de bene esse* deposition of the Plaintiffs' expert witness, Professor Pamela Karlan, and to modify the discovery deadline as needed in order to do so, in light of Professor Karlan's unavailability to appear during trial.

2. Professor Karlan is the Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford Law School and has offered expert testimony on behalf of Plaintiffs regarding whether the addition of a citizenship question to the decennial census would assist the Department of Justice in enforcing section 2 of the Voting Rights Act. Declaration of Pamela S. Karlan ("Karlan Decl.") ¶¶ 1-3.

3. Professor Karlan has submitted an expert report on behalf of Plaintiffs that was timely disclosed to Defendants on September 19, 2018. Declaration of Anna Ferrari ("Ferrari Decl.") ¶ 2. Defendants deposed Professor Karlan on October 25, 2018, in Palo Alto, California. *Id.* ¶ 3.

4. For the first three months of 2019, Professor Karlan will be traveling abroad to satisfy a professional commitment associated with her teaching duties, thereby rendering her unavailable to appear at trial in San Francisco.¹ Karlan Decl. ¶¶ 4-6.

¹ Federal courts have determined that travel by a local witness to a location beyond 100 miles from the trial site can render that witness unavailable for trial within the meaning of Federal Rule of Civil Procedure 32(a)(4)(B) ("A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds: . . . that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition. . . ."). See, e.g., *Torres v. Transguard Ins. Co. of Am. Inc.*, No. CV-13-01578-PHX-ROS, 2015 WL 12632029, *5 (D. Ariz. June 26, 2015) (permitting trial deposition of eyewitness who, although within the court's subpoena power, planned to be more than 100 miles from the trial site during trial); *MMG Ins. Co. v. Samsung Electronics America, Inc.*, 293 F.R.D. 58, 67 (D.N.H. 2013) (permitting use of deposition at trial because witness's vacation plans more than 100 miles from trial site rendered him unavailable under Rule 32); *Branning v. Wayne County*, No. 3:15-cv-1936, 2018 WL 1998312, *2 (permitting use of deposition at trial of a local witness who had international travel plans during trial).

1 5. Professor Karlan's commitment to teach this course predates this action, and no
2 party or party's counsel procured her absence during trial. Karlan Decl. ¶¶ 7-8. Professor Karlan
3 has been a faculty member at this program for several years before this action was filed. *Id.*

4 6. The parties and Professor Karlan have preliminarily agreed to conduct her trial
5 deposition on December 18, 2018, in Washington, D.C., which will spare Defendants the expense
6 and inconvenience of traveling to California for a further deposition. Ferrari Decl. ¶ 4.

7 7. The proposed deposition date would precede the final pretrial conference on
8 January 3, 2019, ECF No. 79 at 2, and provide sufficient time in advance of trial for the parties to
9 designate Professor Karlan's testimony and interpose objections to such designations.

10 8. Although a number of federal courts have determined that a *de bene esse*
11 deposition is not subject to the same timing limitations as a deposition for the purpose of
12 discovery,² in an abundance of caution, the parties hereby seek leave of court to re-open the
13 discovery period should the Court find it necessary to do so for this limited purpose. Professor
14 Karlan's unavailability due to her teaching commitment abroad would provide good cause to do
15 so.

16 **IT IS SO STIPULATED.**

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24 ² *De bene esse* depositions "are used at trial in lieu of live testimony, and are not
25 discovery tools," *Holen v. Jozic*, No. C17-1147JLR, 2018 WL 5761775, *4, n. 4 (W.D. Wash.
26 Nov. 2, 2018). Accordingly, federal courts have determined that trial depositions need not be
27 confined to the discovery period. *See, e.g., Charles v. Wade*, 665 F.2d 661, 664 (5th Cir. 1982)
28 (district court erred in denying trial deposition due to close of discovery period because "the
requested deposition would not have been taken for purposes of discovery but as the testimony of
a witness unavailable for trial"); *Spangler v. Sears, Roebuck and Co.*, 138 F.R.D. 122, 124 (S.D.
Ind. 1991) (close of discovery "does not prevent a party from memorializing a witness' testimony
in order to offer it at trial"); *Estenfelder v. Gates Corp.*, 199 F.R.D. 351, 352-356 (D. Colo. 2001).

1 Dated: November 30, 2018

Respectfully submitted,

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11 Dated: November 30, 2018

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6 Dated: November 30, 2018

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CITY OF SAN JOSE and BLACK ALLIANCE FOR
JUST IMMIGRATION

1 Dated: November 30, 2018

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13
14 **ATTESTATION REGARDING ELECTRONIC SIGNATURES**

15 I, Anna T. Ferrari, attest that all signatories listed, and on whose behalf the filing is
16 submitted, concur in the filing's content and have authorized the filing.

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18 Dated: December 3, 2018

/s/ Anna T. Ferrari

DECLARATION OF ANNA T. FERRARI

I, Anna T. Ferrari, declare as follows:

1. I am a Deputy Attorney General with the California Department of Justice, duly licensed to practice law in the State of California. I am counsel of record in this action for the State of California. I make this declaration in support of the parties' Stipulation for Leave to Conduct Trial Deposition of Pamela Karlan. I have personal knowledge of the facts stated herein and, if called upon to do so, could and would testify competently thereto.

2. Professor Karlan, Plaintiffs' expert witness, has submitted an expert report in this action that was disclosed to Defendants on September 19, 2018.

3. Defendants deposed Professor Karlan on October 25, 2018, in Palo Alto, California.

4. Prior to filing this stipulation, counsel for Plaintiffs and Defendants conferred and agreed to conduct Professor Karlan's trial deposition on December 18, 2018, in Washington, D.C., should the Court grant leave to do so.

5. The Court has granted one previous time modification in this case, extending the close of expert discovery from October 11, 2018, to October 26, 2018.

6. The request to reopen discovery for the purpose of conducting Professor Karlan's trial deposition would have no impact upon the scheduling of the case, including its January 7, 2019, trial date.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 30, 2018 at San Francisco, California.

/s/ Anna T. Ferrari

Anna T. Ferrari

DECLARATION OF PAMELA S. KARLAN

I, Pamela S. Karlan, declare as follows:

1. I am the Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford Law School. I make this declaration in support of the parties' Stipulation for Leave to Conduct Trial Deposition of Pamela Karlan. I have personal knowledge of the facts stated herein and, if called upon to do so, could and would testify competently thereto.

2. My scholarly specialty is constitutional law and litigation, with a special emphasis on legal regulation of the political process.

3. I have offered expert testimony in this action on behalf of Plaintiffs regarding whether the addition of a citizenship question to the decennial census would assist the Department of Justice in enforcing section 2 of the Voting Rights Act.

4. As part of my official duties at Stanford Law School, I have committed to teach a course for the Bing Overseas Studies Program in Italy during the 2019 winter term.

5. In order to teach at the Bing Overseas Studies Program, I will leave the United States on January 2, 2019, and return to the United States on March 22, 2019.

6. I will be unable to appear in person at trial in San Francisco during this period.

7. This is my second time teaching in this program, and I committed to teach at the program more than 18 months ago, before this action was filed.

8. No party or party's counsel procured my participation on this faculty of the Bing Overseas Studies Program.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 3, 2018 at Palo Alto, California.

/s/ Pamela S. Karlan
Pamela S. Karlan

~~PROPOSED~~ ORDER

Based on the parties' Stipulation for Leave to Conduct Trial Deposition of Expert Witness Pamela Karlan, and good cause appearing, this Court finds that Plaintiffs' expert witness Pamela Karlan is unavailable for trial within the meaning of Federal Rule of Civil Procedure 32(a)(4)(B) in light of prior teaching commitments abroad. Accordingly, the parties may depose Professor Karlan at a mutually convenient time and location in advance of trial in order to preserve her trial testimony.

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: 12/5/18


HON. RICHARD SEEBORG
United States District Court Judge